BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-8588
File: 20-214374 Reg: 05060740

7-ELEVEN, INC., JACK FULLER, and KATHLEEN FULLER, dba 7-Eleven Store No. 2237-14113
3040 West Benjamin Holt, Stockton, CA 95219,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: April 3, 2008
San Francisco, CA

ISSUED: JULY 8, 2008

7-Eleven, Inc., Jack Fuller, and Kathleen Fuller, doing business as 7-Eleven Store No. 2237-14113 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days, 5 days of which were conditionally stayed, for having sold an alcoholic beverage to a minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Jack Fuller, and Kathleen Fuller, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

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[1]The decision of the Department, dated July 27, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' license was issued on July 1, 1988. On September 19, 2005, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to Dane Rogers, a 19-year-old minor. Although not stated in the accusation, Rogers was acting as a decoy for the San Joaquin County Sheriff's Department.

At the administrative hearing held on May 19, 2006, documentary evidence was received and testimony concerning the violation charged was presented by Lance Manner, a San Joaquin County deputy sheriff, and by Rogers, the decoy. The evidence established that Rogers purchased a six-pack of Coors Light beer without having been asked his age or for identification.

Subsequent to the hearing, the Department issued its decision which determined that the violation occurred as alleged, and ordered the suspension from which this timely appeal has been taken.

Appellants make the following contentions: (1) the Department communicated ex parte with its decision maker, in violation of the Administrative Procedure Act; and (2) the administrative law judge (ALJ) abused his discretion by departing upward from the Department's penalty recommendation without explaining his reasons for doing so.

DISCUSSION

I

Appellants contend the Department violated the APA by transmitting a report of hearing, prepared by the Department's advocate at the administrative hearing, to the Department's decision maker after the hearing but before the Department issued its decision. They rely on the California Supreme Court's holding in *Department of*

Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*) and appellate court decisions following *Quintanar*, *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th 116 [57 Cal.Rptr.3d 6] (*Chevron*) and *Rondon v. Alcoholic Beverage Control Appeals Board* (2007) 151 Cal.App.4th 1274 [60 Cal.Rptr.3d 295] (*Rondon*). They assert that, at a minimum, this matter must be remanded to the Department for an evidentiary hearing regarding whether an ex parte communication occurred.

The Department states that none of the documents requested in the motion to augment exist. Attached to this statement is a declaration signed by Department staff attorney Nicholas Loehr, who represented the Department at the administrative hearing. In this declaration, Mr. Loehr states that at no time did he prepare a report of hearing or other document, or speak to any person, regarding this case. In its brief, the Department makes no statements or assertions concerning these denials or what it believes should be the effect of them on this appeal.

We agree with appellants that transmission of a report of hearing to the Department's decision maker is a violation of the APA. This was the clear holding of the Court in *Quintanar*, *supra*.

The Department apparently believes that it need only include a declaration denying the existence of an ex parte communication for the Appeals Board to rule in its favor. Appellants argue that the declaration is inadequate. We agree with appellants.

Three courts have now issued published decisions in which the Department's practice of ex parte communication with its decision maker or the decision maker's advisors is determined to be endemic in that agency. (*Quintanar*, *supra*, 40 Cal.4th 1, 5

[ex parte provision of report of hearing was "standard Department procedure"]; *Rondon*, *supra*, 151 Cal.App.4th 1274, 1287 ["widespread agency practice of allowing access to reports"]; *Chevron*, *supra*, 149 Cal.App.4th 116, 131 [ex parte communication not unique to *Quintanar* case, "but rather a 'standard Department procedure'"].) The Department has presented no evidence in this case, or any of the numerous other cases this Board has seen on this issue, that the "standard Department procedure" has changed. The Department has not provided, for example, a written policy, with a date certain, from which we could conclude that the Department has instituted an effective policy screening prosecutors from the decision makers and their advisors. The Department bears the burden of proving that it has adequate screening procedures (*Rondon*, *supra*), and without evidence of an agency-wide change of policy and practice, we would be exceedingly reluctant to affirm or reverse on the basis of a single declaration, especially where there has been no opportunity for cross-examination.[2]

For the foregoing reasons, we will do in this case as we have done in so many other cases, that is, remand this matter to the Department for an evidentiary hearing.

II

Citing the Appeals Board decision in *Corona* (2000) AB-7329, appellants contend that the ALJ abused his discretion when he ordered a suspension different from and greater than the Department recommended.

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[2]"The general rule in civil actions is that absent statutory authorization, stipulation of the parties, or a waiver by failure to object, an affidavit (Code Civ. Proc., § 2003) or a declaration under penalty of perjury (Code Civ. Proc., § 2015.5) is not competent evidence; it is hearsay because it is prepared without the opportunity to cross-examine the affiant. (Evid. Code, §§ 300, 1200; see Code Civ. Proc., § 2009; Witkin, Cal. Evidence (2d ed. 1966) § 628, p. 588.)"
(Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal.App.3d 586, 597 [155 Cal.Rptr. 63].)

In *Corona, supra*, the Department had recommended a 30-day suspension, with 15 days stayed. The ALJ ordered a 40-day suspension with 15 days stayed. The appellant argued that the ALJ had misunderstood the Department's recommendation. The Board reversed the decision as to penalty, and remanded the case to the Department for reconsideration of the penalty. The Board stated:

> This Board has also said on various occasions that it views the Department's penalty recommendations as representing the Department's best thinking at that particular time, and, where an ALJ departs upwardly from the recommendation, he or she should explain why. Judge Lo did not provide any reasons for his enlargement upon the recommendation of Department counsel.
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> Our review of the record does not reveal any unusual circumstance or matter of aggravation which would not already have been known to the Department. The Department's defense on this appeal of the increased penalty, that it reflects prior disciplines, is unpersuasive, since that same explanation was offered to Judge Lo with the Department's original recommendation.
>
> We are not in a position to know whether Judge Lo, as appellant suggests, was simply mistaken as to the recommendation by Department counsel, or whether he simply disagreed with the recommendation. Consequently, consistent with a practice the Board has followed in the past, we think the penalty portion of the decision should be reversed and the matter remanded to the Department for reconsideration of the penalty. Given that attention has now been focused on the matter, we are confident that any departure from the Department's original penalty recommendation will not be the product of oversight or misunderstanding. If the penalty reflects a misunderstanding, we are confident the Department will correct it upon remand. If the upward departure was intended, appellant will know that by the action the Department takes.

It is clear from the discussion between the ALJ and counsel at the hearing (RT 35-42) in the present case that he fully understood the Department's recommendation, and simply disagreed with it. Hence, the concern, expressed in *Corona*, that a penalty might be the product of "oversight or misunderstanding" is not present here.

It is also clear from the language in *Corona, supra*, that the Board did not say that an ALJ could not impose a penalty other than as recommended by the Department. Indeed, the Appeals Board may not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. *(Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].)

We cannot say that the Department abused its discretion when it adopted the proposed decision and the suspension that Judge Dorais ordered. The penalty is consistent with the Department's penalty guidelines (4 Cal. Code Regs. §144).

ORDER

The decision of the Department is affirmed with respect to the issue of penalty, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.[3]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[3]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.